



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 13, 1998

Mr. E. Carey Grace
Assistant City Attorney
City of Houston Legal Department
Post Office Box 1562
Houston, Texas 77251-1562

OR98-0451

Dear Mr. Grace:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 112670.

The Houston Police Department (the "department") received a request for information pertaining to the investigation of the murders of Ruth and John High, which took place on October 8, 1987. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.103(a) of the Government Code reads as follows:

(A) Information is excepted from [required public disclosure] if it is information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103 applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). We also note that section 552.103(b) provides that "[f]or purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court."

You inform this office that the suspect in this case, Richard Charles Duncan, was convicted and received the death penalty on May 25, 1995. You further state that the Harris County District Attorney's Office informs you that a direct appeal and a Writ of Habeas Corpus were both filed and that those appeals are currently pending in the Court of Criminal Appeals. We conclude that you have shown that litigation is pending in this matter and that the requested information relates to the litigation. Therefore, the district attorney may withhold the requested information from required public disclosure.

In reaching this conclusion, however, we assume that the opposing party in the litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a).¹ We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous

¹We note that section 552.103(a) cannot be invoked to withhold from disclosure front page type information, as this information should have already been provided to a defendant by a magistrate or in an indictment. Open Records Decision No. 597 (1991).

determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Michael A. Pearle". The signature is written in a cursive style with a large, stylized 'M' and 'P'.

Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/ch

Ref.: ID# 112670

Enclosures: Submitted documents

cc: Mr. K.S. "Gator" Dunn
Attorney and Counselor at Law
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(w/o enclosures)